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IN THE

# Supreme Court of the United States

CHARLES THOMAS DICKERSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fourth Circuit**

## BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

RICHARD M. ROMLEY
*Maricopa County Attorney*
PAUL AHLER
*Chief Deputy*
MARICOPA COUNTY
ATTORNEY'S OFFICE
301 W. Jefferson Street
Phoenix, Arizona 85003
(602) 506-3800

THEODORE B. OLSON
*Counsel of Record*
DOUGLAS R. COX
MIGUEL A. ESTRADA
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Counsel for Amicus Curiae*

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## QUESTION PRESENTED

Whether 18 U.S.C. § 3501, which requires the admission in evidence of any confession that is found by the trial court to be "voluntary," violates the Fifth Amendment to the United States Constitution.

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## BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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### INTEREST OF AMICUS CURIAE[1]

The question presented in this case is whether 18 U.S.C. § 3501, which requires trial courts to admit voluntary confessions in evidence, comports with the Fifth Amendment. Amicus curiae Maricopa County Attorney's Office is the largest prosecutors' office in the State of Arizona, and it initiated the prosecution that culminated in this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Maricopa County prosecutors have experienced the adverse effects of *Miranda*'s rigid exclusionary rule in ways that may not be apparent to this Court from an examination of reported cases alone. Because prosecutors must make charging decisions on the basis of the legally admissible evidence likely to be available at trial, Maricopa County prosecutors have foregone bringing charges, or have brought reduced charges pursuant to plea bargains, in cases in which officers failed to comply with the technical requirements imposed by *Miranda*.

Arizona, like the United States, has enacted a statute that would ameliorate those untoward consequences of the *Miranda* regime. Like Section 3501, Arizona's statute provides that "[i]n any criminal prosecution * * *, a confession shall be admissible in evidence if it is voluntarily given." ARIZ. REV. STAT. § 13-3988A. Arizona law instructs trial judges to consider all relevant circumstances in determining voluntariness, and it expressly highlights for the court's consideration the same factors

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus Maricopa County Attorney's Office states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

set forth at 18 U.S.C. § 3501(b). *See* ARIZ. REV. STAT. § 13-3988B. Because this Court's ruling in this case will affect the constitutionality of that parallel Arizona statute, amicus has a vital interest in the correct resolution of this case.

## STATEMENT

### A. The Law of Confessions Before *Miranda*: "Voluntariness" And *McNabb-Mallory*

1. Voluntary confessions "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (internal quotation marks omitted). The Court has long recognized, however, that confessions may sometimes be produced by tactics that offend federal law.

Beginning with *Brown v. Mississippi*, 297 U.S. 278 (1936), a case in which a confession had been obtained by the use of beatings and other physical torture, the Court consistently relied on the Due Process Clause of the Fourteenth Amendment to rule that coerced confessions may not be admitted in evidence. Although the Court's initial rulings dealt with confessions produced by physical brutality or its threat, *e.g.*, *White v. Texas*, 310 U.S. 530, 532 (1940) (beatings); *Ashcraft v. Tennessee*, 322 U.S. 143, 147 (1944) ("fear of violence at the hands of a mob"), the Court's "voluntariness" analysis also came to encompass confessions that were coerced by improper psychological ploys—*i.e.*, ploys that unfairly exploited those characteristics of a suspect that rendered him less able to exercise free will. *E.g.*, *Leyra v. Denno*, 347 U.S. 556 (1954) (abuse of physician-patient relationship to extract confession); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (defendant offered leniency and the opportunity to retain her two young children and welfare assistance). In sum, the Court's "voluntariness" doctrine recognized that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, [were] so offensive to a civilized system of justice" that they could not be reconciled with due process. *Colorado v. Connelly*, 479 U.S. 157, 163 (1987) (internal quotation omitted).



2. Although this Court's "voluntariness" cases addressed the admissibility of confessions in State cases solely by insisting on observance of the basic requirements of due process, the Court adopted a different approach with respect to confessions introduced in federal prosecutions. In *McNabb v. United States*, 318 U.S. 332, 341 (1943), "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," the Court mandated exclusion of confessions that had been obtained during custodial interrogation—if the defendant's custody violated the rule (now set forth in FED. R. CRIM. P. 5) that requires an arrested person to be taken before a magistrate without undue delay. *McNabb* explained that the purpose of that prompt-presentment rule, to be vindicated by the new suppression remedy, was to "check[] resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." 318 U.S. at 344.

The *McNabb* rule reached its apogee in *Mallory v. United States*, 354 U.S. 449 (1957), where the Court reversed the defendant's rape conviction and death sentence solely because of a delay in presentment. The defendant in *Mallory* had been presented to a magistrate the morning immediately following the afternoon on which he was arrested, and he had confessed in the interim. *Id.* at 450-51. The *Mallory* Court explained the rationale for the *McNabb* exclusionary rule by pointing to FED. R. CRIM. P. 5, which requires (in language now found in Rule 5(c)) that, upon presentment, a defendant be advised that he has a right to counsel, that he need not make any statement, and that any statement he does make may be used against him. *Id.* at 453-54. The Court believed that the arresting officers improperly deprived Mallory of the safeguard provided by that "judicial caution" by delaying his appearance before a magistrate in order to obtain a confession. *Id.* at 455.

The lower federal courts construed *Mallory* quite strictly, ruling that delays in presentment as short as a few minutes warranted suppression of a defendant's confession. Indeed, in a case that later became a focus of congressional concern, *see* S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-25, a confession given within five

minutes of arrest was ordered suppressed under the *McNabb-Mallory* rule even though the arresting officers had advised the defendant that "he need make no statement and if he did it would be used against him." *Alston v. United States*, 348 F.2d 72, 73 (D.C. Cir. 1965) (opinion of Bazelon, C.J.).

### B. The *Miranda* Decision

Seven years after its decision in *Mallory*, this Court concluded in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment's privilege against compelled self-incrimination is binding on the States through the Due Process Clause of the Fourteenth Amendment. That ruling provided an essential predicate for *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court held for the first time that the Fifth Amendment privilege may be implicated when State authorities question a suspect who is in police custody.[2]

1. The *Miranda* Court concluded that custodial interrogation can generate "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. To counteract those pressures, the Court devised a set of prophylactic rules intended to safeguard the Fifth Amendment privilege in the context of custodial interrogation. In particular, the Court held that police must advise a suspect that he has the right to remain silent, that he has the right to consult with counsel and to have such counsel present during interrogation, and that counsel can be appointed for the suspect if he is indigent. Police must also

[2] Between its decisions in *Mallory* and *Miranda*, the Court decided *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* ruled a custodial confession inadmissible on the ground that, in the circumstances of that case, the suspect's interrogation violated his Sixth Amendment right to the "Assistance of Counsel." The Court later disavowed *Escobedo*'s Sixth Amendment rationale, and "in retrospect perceived that the prime purpose of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, to guarantee full effectuation of the privilege against self-incrimination." *Moran v. Burbine*, 475 U.S. 412, 429-30 (1986) (internal quotation marks omitted).



advise a suspect that if he waives those rights, anything he says can be used against him in Court. *Id.* at 467-73. Those warnings largely parallel the "caution" that a judicial officer must give the defendant under FED. R. CRIM. P. 5. Indeed, the *Miranda* Court stated that the "prophylaxis" created by the *McNabb-Mallory* exclusionary rule, while anchored in the Court's "supervisory" authority, was "nonetheless responsive to the same considerations of Fifth Amendment policy" that prompted its *Miranda* ruling. *Id.* at 463.

2. As the Court's concern with the *risk* of compelled self-incrimination made clear, the warnings prescribed by *Miranda* were "not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Indeed, *Miranda* itself expressly invited Congress and State legislatures to devise other procedures for protecting the privilege (384 U.S. at 467):

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

### C. Congressional Response To *Mallory* And *Miranda*: 18 U.S.C. § 3501

Congress reacted to this Court's rulings in both *Mallory* and *Miranda* with Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210. The Senate Judiciary Committee conducted extensive hearings on the

subject and formulated the provisions relating to the admissibility of confessions that are now codified at 18 U.S.C. § 3501.

The Senate Judiciary Committee Report that accompanied the legislation made clear that Section 3501 was intended to supersede the inflexible exclusionary rules invoked by this Court in *McNabb*, *Mallory* and *Miranda*. Based on "the mass of evidence" adduced during hearings, the Judiciary Committee became "convinced * * * that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement." 1968 U.S.C.C.A.N. at 2132. The same was true, the Committee believed, with respect to the *McNabb-Mallory* rule, which imposed "a very high price * * * for a 'constable's blunder.'" *Id.* at 2124. In particular, "[i]nstance after instance [was] documented * * * where the most vicious criminals ha[d] gone unpunished, even though they had voluntarily confessed their guilt." *Id.* at 2132; *see also ibid.* ("testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country[] demonstrat[e] beyond doubt the devastating effect upon the rights of society of the *Miranda* decision").[3]

The Judiciary Committee's hearings also revealed "that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for the [Court's] opinion in *Miranda* [were]

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[3] Indeed, "the testimony of many witnesses, and statements and letters of many other interested parties," persuaded the Committee that the decisions in *Mallory* and *Miranda* had

> resulted in the release of criminals whose guilt is virtually beyond question. This has had a demoralizing effect on law-enforcement officials whose efforts to investigate crimes and interrogate suspects have been stymied by th[ose] technical roadblocks * * *. The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims. For example, the infamous Mallory was convicted on another rape charge shortly after his rape conviction was reversed by the Supreme Court.

1968 U.S.C.C.A.N. at 2127.



not a correct portrayal of what actually goes on in police stations across the country." 1968 U.S.C.C.A.N. at 2134 (citing testimony from Arlen Specter, then District Attorney for Philadelphia, Pennsylvania). To the contrary, the Committee found that "cases of police using coercive tactics" were "isolated" and very much "the exception rather than the rule." *Ibid.* Because coercive police practices that "might have been approved 30 years ago" were no longer in use, the Committee concluded that this "Court overreacted to defense claims that police brutality is widespread." *Ibid.*

That record led the Committee to conclude that the traditional "voluntariness" inquiry should govern the admissibility of all custodial confessions in federal court. The Committee noted that "[s]ince the *McNabb-Mallory* rule was formulated in the exercise of the Supreme Court's supervisory powers * * * and has never been considered a constitutional requisite, no constitutional obstacle is imposed in the way of its legislative repeal." 1968 U.S.C.C.A.N. at 2126 (quoting testimony from Thomas C. Lynch, Attorney General of California). With respect to *Miranda*, the Committee noted that "a few ha[d] expressed" doubts about Congress's authority to overturn *Miranda*'s exclusionary rule, but that "the vast majority of the witnesses" who testified on the issue "expressed no doubt as to the constitutionality" of legislation requiring admission of all voluntary confessions, since this Court expressly contemplated that Congress could legislate in the area and "[v]oluntary confessions have been admissible in evidence since the early days of the Republic." 1968 U.S.C.C.A.N. at 2137, 2124. The Committee also noted that Congress has the "power to prescribe rules of evidence in Federal courts," and that, by conducting hearings, it is "possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions"; whereas courts "consider[] only the limited facts and issues of each particular case [and] do not have the opportunity to evaluate all these factors." *Id.* at 2133.

Congress adopted the Committee's view by enacting Section 3501 of Title 18. Subsection (a) of the statute repudiates the rigid exclusionary rules laid down in *McNabb*, *Mallory* and

*Miranda* by providing that, in any federal prosecution, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). Subsection (a) goes on to endorse this Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), by requiring that the trial judge determine the issue of voluntariness outside the hearing of the jury. In addition, subsection (a) gives the defendant a second opportunity to challenge the voluntariness of his confession by requiring that the jury be permitted to assess the voluntariness issue independently.

Subsection (b) provides that, in determining the issue of voluntariness, the trial judge must take into consideration all relevant circumstances, and further emphasizes five specific factors. In deference to the concerns articulated by this Court in the *McNabb-Mallory* cases, the trial court must consider the time between arrest and arraignment, if the confession occurred after arrest and before arraignment. *See* 18 U.S.C. § 3501(b)(1). In deference to the concerns articulated by this Court in *Miranda*, the trial court must also consider whether the defendant knew the nature of the offense of which he was suspected when he made his confession; whether the defendant knew that he was not required to make a statement and that any statement could be used against him; whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and whether the defendant was without counsel when he was questioned. *See* 18 U.S.C. § 3501(b)(2)-(5).

**D. Proceedings Below**

1. On January 24, 1997, the First Virginia Bank in Alexandria, Virginia, was robbed at gunpoint. A witness took down the license plate for the getaway car, which was traced to petitioner. J.A. 36-37.

A team of FBI agents and local police visited petitioner at his apartment in Takoma Park, Maryland. Although petitioner refused the agents consent to search his apartment, he agreed to accompany them to the FBI's Washington, D.C., field office, where he was interviewed by FBI Special Agent Lawlor and Alexandria Detective Durkin. J.A. 37, 167-68. In that initial interview, petitioner admitted only that, on the morning of the



bank robbery, he had parked his car in the Old Town area of Alexandria in order to purchase a bagel. *Id.* at 43, 168. Because that admission placed petitioner and his car near the scene of the robbery, Agent Lawlor left the interview room to obtain (by telephone) a warrant to search petitioner's apartment for evidence of the bank robbery. *Ibid.* Agent Lawlor then returned to the interview room and told petitioner that his apartment would be searched. *Id.* at 44-45, 170.[4]

There was conflicting testimony at the suppression hearing about what occurred next. Agent Lawlor testified that petitioner was advised of his rights under *Miranda* and that petitioner waived those rights before he proceeded to describe how, on the morning of the robbery, he had been in Old Town with one Jimmy Rochester, whom petitioner knew to be a bank robber. According to Agent Lawlor, petitioner claimed that Rochester had put something in the trunk of petitioner's car, and that he had asked petitioner to run a red light as they drove away. Petitioner also claimed that Rochester had given him a pistol and dye-stained money. J.A. 45-47, 49-50, 170. Petitioner, on the other hand, testified that he made those statements *before* he was advised of his *Miranda* rights. *Id.* at 61, 171-72.

2. The district court credited petitioner's testimony that he received *Miranda* warnings only after he had confessed, and it accordingly suppressed petitioner's statements. J.A. 154-55. The court also concluded, however, that petitioner's statements were voluntary, and for that reason it refused to suppress evidence found as a result of the statements. *Id.* at 158 n.1, 212.

The government sought reconsideration, contending, *inter alia*, that Section 3501 required admission of petitioner's voluntary statements "even if *Miranda* warnings were required and not timely given." *Id.* at 94-95. The court denied the government's motion without addressing Section 3501. *Id.* at 157-61.

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[4] The search of petitioner's apartment revealed "a silver .45-caliber handgun [like the one used in the robbery], dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves." J.A. 170.

3. The court of appeals reversed. J.A. 162-225. The court found it "perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court." *Id.* at 163, 197. In finding that Congress has the power to overrule *Miranda*'s inflexible exclusionary rule, the court noted that the *Miranda* opinion never "refer[s] to the warnings as constitutional rights," and that this Court "consistently (and repeatedly) has referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution.'" *Id.* at 203 (citations omitted).

After surveying the history of *Miranda*'s application by this Court—especially this Court's refusal to apply the "tainted fruits" doctrine to evidence obtained as a result of unwarned confessions—the court of appeals held that "the irrebuttable presumption created * * * in *Miranda* * * * is *a fortiori* not required by the Constitution." J.A. 207. The court further concluded that the voluntariness standard in Section 3501 will not "provide[] those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings" because "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." *Id.* at 210-11. Because the district court had already determined that petitioner's statements were voluntary, the court of appeals reversed the district court's order suppressing them. *Id.* at 212, 217.

## SUMMARY OF ARGUMENT

Congress acted well within its constitutional authority in enacting 18 U.S.C. § 3501, because *Miranda*'s exclusionary rule is neither an interpretation of the Fifth Amendment nor otherwise required by the Constitution. Although *Miranda* itself suggested that the Court was interpreting the Fifth Amendment, that view is inconsistent with the traditional understanding of "compulsion," to which this Court has continued to adhere, and with many post-*Miranda* cases that have expressly disclaimed a constitutional basis for *Miranda,* particularly *Harris v. New York*, 401 U.S. 222 (1971), *New York v. Quarles*, 467 U.S. 649 (1984), and *Oregon v. Elstad*, 470 U.S. 298 (1985). Those



post-*Miranda* cases permit use of statements obtained in violation of *Miranda*, among other things, to impeach the defendant and to secure other evidence against him. Because the Fifth Amendment requires exclusion of *all* evidence derived from compelled testimony and forbids using such evidence even for impeachment, *see, e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972), this Court necessarily has held that *Miranda*'s exclusionary rule does not remedy any Fifth Amendment violation. Indeed, this Court has expressly repudiated the standard for compulsion embraced by *Bram v. United States*, 168 U.S. 532 (1897), the case on which the *Miranda* Court based its conclusion. *Miranda*, 384 U.S. at 461.

Moreover, if *Miranda* were required by the Fifth Amendment, as petitioner and the Solicitor General contend, it would create another anomaly—this one in this Court's substantive due process jurisprudence. It is clear that a claim is not to be analyzed under substantive due process if it is "covered by a specific constitutional provision." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Yet this Court has held that a defendant who received *Miranda* warnings may nevertheless seek to suppress his statements on the ground that they were "involuntary" under substantive due process standards. *Mincey v. Arizona*, 437 U.S. 385 (1978).

The fact that this Court has applied *Miranda* to the States and allowed it to be raised in habeas proceedings does not establish that *Miranda*'s exclusionary rule is required by the Fifth Amendment. This Court has never expressly addressed the basis of its authority to apply *Miranda* to the States, and has, in any event, rejected the notion that Congress lacks authority to provide remedies for violation of the Constitution that are different from those prescribed by this Court. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Congress surely must possess similar power to create alternatives to prophylactic rules that guard against the mere *risk* of a constitutional deprivation.

Indeed, as this Court recently made clear in *Smith v. Robbins*, 120 S. Ct. 746 (2000), judicially created prophylactic

rules—even rules devised in State cases and consistently applied by this Court to the States—may be modified so long as the underlying constitutional right is vindicated. *Miranda* itself invited Congress and the States to develop their own alternative approaches to the admissibility of custodial confessions, and disclaimed any intent to create a "constitutional straitjacket" that would "handicap sound efforts at reform." *Miranda*, 384 U.S. at 467. If, as the parties essentially contend, no alternative is permissible that does not incorporate *Miranda*'s scheme of mandatory warnings and an inflexible exclusionary rule, the Court's invitation would be largely meaningless.

Even if Congress does not have the power to reject *Miranda*'s exclusionary rule, this Court should do so because the principles of *stare decisis* do not counsel in favor of retaining that rule. This Court's cases since *Miranda* have rejected its Fifth Amendment premises, and Congress has rejected its factual ones. In addition, *Miranda* runs afoul of this Court's teaching in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the federal government cannot impose prophylactic rules on States without showing congruence and proportionality between the injury and the remedy.

Law enforcement officers undoubtedly will continue their practice of giving the warnings as an efficient way of establishing voluntariness, but rejection of *Miranda*'s inflexible exclusionary rule will ensure that the criminal process will have the benefit of competent, reliable and constitutional evidence in the rare cases in which officers fail to comply with the technical requirements of *Miranda* doctrine.

## ARGUMENT

### THE FIFTH AMENDMENT DOES NOT REQUIRE *MIRANDA*'S EXCLUSIONARY RULE

Petitioner and the Solicitor General spend the bulk of their respective briefs attempting to establish that—notwithstanding this Court's numerous statements to the contrary—*Miranda*'s exclusionary rule is somehow *required* by the Fifth Amendment, and that it therefore may not be modified by Congress or



the States unless this Court "overrules" *Miranda*. SG Br. 11-26; Pet. Br. 13-27. Neither the Solicitor General nor petitioner, however, explains how that contention can be squared with any coherent analysis of elementary principles of Fifth Amendment doctrine that this Court has consistently followed both before and after *Miranda*.

Those principles unmistakably show what this Court has, in any event, repeatedly conceded—*i.e.*, that *Miranda*'s exclusionary rule cannot plausibly be viewed as a remedy for any Fifth Amendment "compulsion." Indeed, both the Solicitor General and petitioner cloak their contentions in gauzy terminology—repeatedly asserting, for example, that *Miranda* is "constitutionally based" or that it has "constitutional weight"—that tellingly exposes their utter inability to identify, either in the plain terms of the Fifth Amendment or in conventional Fifth Amendment doctrine, a home for *Miranda*'s unyielding exclusionary rule. *E.g.*, SG Br. 23; Pet. Br. 22.

Because the Fifth Amendment plainly does not *require* that inflexible rule of exclusion for voluntary, though unwarned, custodial statements, Congress acted well within its proper sphere of authority in enacting 18 U.S.C. § 3501. There is therefore no need to "overrule" *Miranda* in order to sustain the constitutionality of the statute. Even were this Court to conclude otherwise, "the customary deference accorded the judgments of Congress," particularly where, "as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), and the inconsistency of *Miranda*'s rigid exclusionary rule with significant bodies of constitutional doctrine, should cause this Court to reconsider and reject that exclusionary rule.

#### A. This Court Has Rejected The Proposition That *Miranda* Is Required By The Fifth Amendment

1. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As is evident from its language, "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony," and therefore it "does not prohibit

every element which influences a criminal suspect to make incriminating admissions." *United States v. Washington*, 431 U.S. 181, 187-88 (1977); *see also Fisher v. United States*, 425 U.S. 391, 397 (1976) ("[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege"); *Hoffa v. United States*, 385 U.S. 293, 304 (1966) ("a necessary element of compulsory self-incrimination is some kind of compulsion"); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("[t]he Amendment speaks of compulsion"). In particular, nothing in the Fifth Amendment "preclude[s] a witness from testifying voluntarily in matters which may incriminate him." *Monia*, 317 U.S. at 427.

At the outset, *Miranda* fits uneasily within that basic framework, because it effectively requires that unwarned custodial statements be "presumed compelled and * * * excluded from evidence at trial in the State's case in chief" (*Oregon v. Elstad*, 470 U.S. 298, 317 (1985)) even though the accused has never affirmatively claimed the privilege. Yet this Court has long held—both before and since *Miranda*—that a person who fails affirmatively to claim the protection of the Fifth Amendment is not "considered to have been 'compelled' within the meaning of the Amendment." *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *Monia*, 317 U.S. at 427); *Garner v. United States*, 424 U.S. 648, 654 (1976) ("if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself"); *United States ex rel. Vatjauer v. Commissioner of Immigration*, 273 U.S. 103, 112-13 (1927) (same). In other words, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. * * * [I]f he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty from his decision to do so." *Murphy*, 465 U.S. at 429.

*Murphy* suggested that the "extraordinary safeguard[s]" that *Miranda* adopted are a "well-known exception" to conventional



Fifth Amendment doctrine. 465 U.S. at 429-30. The Court has, however, often articulated a far more plausible explanation for *Miranda*'s failure to meet the doctrinal requirements for "compulsion" that this Court repeatedly embraced both before and after *Miranda*—*i.e.*, that "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth v. Egan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring). As the Court has repeatedly stated, "[t]he prophylactic *Miranda* warnings * * * are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. at 444); *see also Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("*Miranda* * * * is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose"); *Elstad*, 470 U.S. at 310 ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced"); *Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (Kennedy, J., dissenting) (*Miranda* "operates even absent constitutional violation").

Indeed, while *Miranda* itself suggested that the Court's analysis of compulsion (and its consequent adoption of an exclusionary rule) reflected the Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment, this Court has been explicit in rejecting the precedent on which *Miranda* relied to suggest that the Clause is directed to the subject of custodial confessions. *Bram v. United States*, 168 U.S. 532 (1897), a case that *Miranda* described as "set[ting] down the Fifth Amendment standard for compulsion which we implement today" (*Miranda*, 384 U.S. at 461-62), long stood for the proposition that a statement must be deemed "compelled" if it was induced by any threat or promise or by the exertion of any improper influence "however slight." *Bram*, 168 U.S. at 542-43. That broad conception of "compulsion" best explains why *Miranda* was able to reason that pressures inherent in custodial interrogation may suffice to "compel" a confession. Yet this Court has expressly repudiated *Bram*, explaining that "under

current precedent" that case "does not state the standard for determining the voluntariness of a confession." *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991). It is, to say the least, anomalous for petitioner and the Solicitor General to proclaim the existence of a "constitutional basis" for *Miranda* without even discussing this Court's express rejection of the principal precedential basis that decision ever purported to have.

2. This Court not only has *said* that *Miranda*'s exclusionary rule is not an interpretation of, nor otherwise required by, the Fifth Amendment; this Court's cases have necessarily so *held*. *Miranda*'s exclusionary rule cannot be viewed as a remedy for any Fifth Amendment "compulsion," because, as demonstrated by this Court's immunity cases, true "compulsion" *must* be remedied by excluding all evidence derived directly or indirectly from the "compelled" statement. This Court, by contrast, has repeatedly held that such a remedy is not necessary for *Miranda* violations. Neither petitioner nor the Solicitor General attempts to reconcile those two lines of authority.

a. The quintessential example of true Fifth Amendment "compulsion" is a judicial order directing a citizen to answer on pain of punishment. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the first case in which this Court considered the constitutionality of immunity statutes, this Court made clear that such compulsion requires a broad suppression remedy. The immunity statute at issue in *Counselman* provided that no "evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him * * * in any court of the United States." *Id.* at 560. This Court construed that language as affording a witness protection only against use by the government of the specific testimony compelled from the witness under the grant of immunity, and thus as not "prevent[ing] the use of his testimony to search out" other evidence. *Id.* at 564. As so construed, the statute was found to violate the Fifth Amendment, because the prohibition on the government's use of the compelled testimony was not "a full substitute" for that amendment's prohibition. *Id.* at 585-86. In other words, the immunity provided by the statute in *Counselman* "was incomplete, in that it merely forbade the use



of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Ullmann v. United States*, 350 U.S. 422, 437 (1956).

By contrast, in *Kastigar v. United States*, 406 U.S. 441 (1972), the Court upheld the constitutionality of the current federal immunity statute, 18 U.S.C. § 6002. Unlike the statute considered in *Counselman*, Section 6002 provides immunity from the use of compelled testimony *and* from the use of any evidence derived "directly or indirectly" from such testimony. *Kastigar* reasoned that because Section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," the immunity it provides "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453.

Since its decision in *Kastigar*, the Court has repeatedly held that a witness who has been "compelled" to testify within the meaning of the Fifth Amendment *must* be accorded both "use" *and* "derivative use" immunity. *See, e.g., United States v. Balsys*, 524 U.S. 666, 692 (1998) (noting that the Fifth Amendment "requir[es] the Government to pay a price in the form of use (and derivative use) immunity"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254-55 (1983) (same). As the Court explained in holding that such compelled statements may not be used even to *impeach* a witness, true "compulsion" implicates the Fifth Amendment "in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

b. This Court's *Miranda* cases cannot be reconciled with the proposition that *Miranda* redresses any form of Fifth Amendment "compulsion." In *Harris v. New York*, 401 U.S. 222 (1971)—one of the Court's earliest *Miranda* cases—this Court held that unwarned custodial statements may be used to impeach the defendant if he takes the stand. Although *Miranda* itself had suggested that unwarned statements could not be so used, *see Miranda*, 384 U.S. at 477, this Court explained that

that suggestion "was not at all necessary to the Court's holding and cannot be regarded as controlling." *Harris*, 401 U.S. at 224. Reasoning that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," the Court refused to endorse a more sweeping exclusionary rule. *Id.* at 225-26. Thus, the *Miranda* doctrine expressly permits the use of unwarned custodial statements to impeach the defendant, and it does so on the basis of a balancing of interests that would be wholly impermissible if the Court were dealing with statements obtained in violation of the Fifth Amendment. *See Portash*, 440 U.S. at 459. That "balance was struck in *Harris*" and the Court has not been "disposed to change it." *Oregon v. Hass*, 420 U.S. 714, 723 (1975); *see also Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (reaffirming *Harris* rule).

Nor are the impeachment cases isolated examples of *Miranda*'s inconsistency with the rule that truly compelled statements may not be used for any purpose. In *Quarles*, *supra*, the Court adopted a "public safety" exception to *Miranda*, concluding that unwarned custodial statements and physical evidence derived from those statements need not be excluded—even from the prosecution's case-in-chief—if the interrogation that produced those statements was prompted by the officer's reasonable concern for public safety. *Quarles*, 467 U.S. at 654-57. The Court "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. That conclusion, the Court observed, is consistent with the traditional Fifth Amendment rule that neither compelled statements nor evidence derived from them may be used at trial, because *Miranda* did not hold that unwarned custodial statements are in fact "compelled" or "coerced." *Id.* at 655 & n.5. Instead, the *Miranda* Court held merely that warnings "would reduce the likelihood that * * * suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house." *Id.* at 656.



The Court reaffirmed that view of *Miranda* in *Elstad*, *supra*, where it again held that unwarned statements do not "taint" evidence subsequently derived from those statements, so as to make such derivative evidence inadmissible in the prosecution's case-in-chief. The Court emphasized that a "simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment," and that *Miranda* "itself recognized this point when it disclaimed any intent to create a 'constitutional straitjacket' and invited Congress and the States to suggest 'potential alternatives for protecting the privilege.'" *Elstad*, 470 U.S. at 306-07 & n.1.

In sum, *Harris*, *Quarles* and *Elstad* necessarily establish that *Miranda*'s inflexible exclusionary rule is *not* required by the Fifth Amendment. Although the Self-Incrimination Clause *does* require a rigid exclusionary rule for truly compelled statements, the Court's willingness to modify the *Miranda* rule on the basis of considerations of policy, as evidenced by its rulings on impeachment and derivative evidence, belies any argument that *Miranda* is the rule that the Constitution requires.[5] In other words, despite this Court's view that unwarned statements must be "presumed * * * compelled" (*Elstad*, 470 U.S. at 317), the departure in *Harris*, *Quarles* and *Elstad* from the *Counselman-Kastigar* rule demonstrates that the "presumption" does not reflect any conclusion that such unwarned statements are *in fact* "compelled" within the meaning of the Fifth Amendment.[6]

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[5] Indeed, Congress's decision to provide a remedy for compelled statements that mirrored the results obtained under *Harris*, *Quarles* and *Elstad* was the reason this Court struck down the immunity statute at issue in *Counselman*. Neither petitioner nor the Solicitor General has explained how, if *Miranda*'s exclusionary rule is indeed required to remedy some form of Fifth Amendment "compulsion," this Court could lawfully assert (by ruling as it did in *Harris*, *Quarles* and *Elstad*) for itself the authority that it has long denied to Congress.

[6] The view that *Miranda* does not remedy any Fifth Amendment "compulsion" also follows, of course, from the Court's traditional rule that no such compulsion occurs unless the witness affirmatively claims the protection of the privilege. *Monia*, 317 U.S. at 427.

Where there is no constitutional violation, Congress must be free to craft an alternative framework for the admissibility of those statements.

### B. This Court's Substantive Due Process Decisions Are Inconsistent With The Proposition That *Miranda* Defined The Fifth Amendment

The fact that unwarned custodial statements are simply not "compelled" within the meaning of the Fifth Amendment also explains another aspect of this Court's jurisprudence of confessions that both petitioner and the Solicitor General ignore: this Court's insistence that a defendant who receives warnings in accordance with *Miranda* may nonetheless seek to suppress his statements on the ground that those statements were "involuntary" under *due process* standards. *See Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (suppressing statements on that theory); *see also Elstad*, 470 U.S. at 307-08 ("Where an unwarned statement is preserved for use in situations that fall outside the sweep of * * * *Miranda* * * *, the primary criterion of admissibility remains the 'old' due process voluntariness test") (internal brackets, quotation marks and citation omitted).

1. The Court's retention of *due process* "voluntariness" as a claim that a defendant may make *in addition* to any claim he may have under *Miranda* and its progeny strongly supports the view that unwarned custodial statements do not, as a general matter, violate any provision of the Fifth Amendment. That is because the Court has made clear that due process is a *residual* doctrine that may be invoked *only* when no specific provision of the Bill of Rights addresses the alleged deprivation at hand. *See, e.g., Graham v. Connor*, 490 U.S. 386, 395 (1989).

As the Chief Justice has noted, because the Framers of our Constitution sought to restrict arbitrary or oppressive government action primarily through the Bill of Rights, only the specific Amendment that addresses a "particular sort of government behavior," rather than substantive due process principles, should be applied to claims challenging that particular behavior. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J., joined by O'Connor, Scalia, &



Ginsburg, JJ.); *see also id.* at 281 (Kennedy, J., joined by Thomas, J., concurring in judgment) ("I agree with the plurality that [the] allegation * * * must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). Thus, under settled doctrine, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

2. The Court's continued reliance on substantive due process principles in assessing the voluntariness of custodial confessions necessarily means that such confessions are not "covered by" the Self-Incrimination Clause of the Fifth Amendment—presumably because the Court continues to adhere to the conventional understanding of "compulsion" reflected in *Monia* and similar cases. Indeed, that reliance on substantive due process would be inexplicable if—as petitioner and the Solicitor General appear to believe—unwarned custodial statements violate some undefined component of the Self-Incrimination Clause of the Fifth Amendment.

### C. That This Court Has Ruled On *Miranda* Issues In State Cases Does Not Establish That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule

The parties contend, however, that this Court's application of *Miranda* to the States, and its conclusion that *Miranda* claims may be raised in habeas corpus proceedings, *Withrow v. Williams*, 507 U.S. 680 (1993), conclusively show that *Miranda* is a rule of federal constitutional law that Congress is powerless to modify. *See* Pet. Br. 27; *see also* SG Br. 23-25. That argument is unavailing.

1. To begin with, while this Court has decided *Miranda* issues in cases arising out of State courts, this Court has never clearly defined the basis for, or the contours of, its authority to apply *Miranda*'s exclusionary rule to the States, and it certainly has not examined those questions in the wake of *Harris*,

*Quarles* and *Elstad*. Those State cases therefore have no precedential value on those antecedent questions, since, as the Court has frequently stated, "questions which merely lurk in the record are not resolved, and no resolution of them may be inferred." *United States v. Shabani*, 513 U.S. 10, 16 (1994) (internal quotation marks omitted); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Webster v. Fall*, 266 U.S. 507, 511 (1925). Indeed, even if those State cases were viewed as speaking to whether *Miranda*'s exclusionary rule in fact remedies any Fifth Amendment violation, that would *at most* establish that they are inconsistent with *Harris*, *Quarles* and *Elstad*, which—unless this Court is to overrule *Counselman* and *Kastigar*—necessarily stand for the contrary proposition. Yet neither petitioner nor the Solicitor General offers a persuasive reason for simply picking one line of authority and ignoring the other.

2. In any event, the argument advanced by petitioner and the Solicitor General proceeds from an erroneous premise. Although it is true that this Court lacks authority to impose "supervisory" rules (*i.e.*, rules dictated solely by this Court's sense of desirable practice) on the State courts, it by no means follows that any rule that this Court bases on the Constitution, or that it decides to apply to the States, may never be overridden legislatively. In fact, this Court's cases are to the contrary.

To cite only the most obvious example, the Court has recognized private rights of action—based on the Constitution itself—for damages caused by violations of the Fourth, Fifth and Eighth Amendments, while consistently recognizing that Congress retains authority to "provide[] an alternative remedy which it explicitly declare[s] to be a substitute for recovery directly under the Constitution." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis omitted) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (Due Process Clause of the Fifth Amendment; "in the absence of affirmative action by Congress"); *Bivens*, 403 U.S. at 397 (Fourth Amendment; noting absence of an "explicit congressional declaration that persons injured * * * must instead be remitted to another remedy, equally effective in the view of Congress"). The rule could



hardly be otherwise, because—even with respect to *actual* violations of the Constitution—Congress has undoubted authority to direct courts to employ one constitutionally adequate remedy rather than another. *See* U.S. CONST. amend. XIV, § 5. It would be strange indeed if Congress possessed no similar authority with respect to "prophylactic" rules intended merely to guard against the *risk* of a constitutional deprivation.

### D. *Miranda* Itself Invited Congress And The States To Develop Their Own Approaches To The Admissibility Of Custodial Confessions

The parties' contention that Congress lacks authority to modify *Miranda*'s exclusionary rule rings especially hollow in light of this Court's invitation to Congress and the States, in *Miranda* itself, to frame their own approaches to the admissibility of confessions. *Miranda*, 384 U.S. at 467. The parties contend, however, that this Court's invitation permits only those alternative approaches that, like *Miranda*, expressly apprise a defendant of his rights. *E.g.*, SG Br. 27. Although certain language in *Miranda* does support that proposition, this Court should reject the parties' argument.

1. There is no basis in this Court's cases for the parties' attempt to parse through the *Miranda* opinion as though it were a statute. *Cf. Duckworth v. Egan*, 492 U.S. at 203 ("courts * * * need not examine *Miranda* warnings as if construing a will or defining the terms of an easement"). That approach is especially inadvisable given that the parties' reading of *Miranda* would transform that opinion into the very "constitutional straitjacket" that the Court was at pains to disclaim (384 U.S. at 467), and would effectively nullify any alternative approach to the admissibility of confessions that does not take the *Miranda* framework as an unchangeable "floor." The result could stifle alternative frameworks—or new technologies—that may well be more efficacious than *Miranda* in assuring the voluntariness of confessions.

Far from being required by precedent, that inflexible approach to prophylactic rules was recently rejected by the Court in *Smith v. Robbins*, 120 S. Ct. 746, 756-59 (2000). *Robbins*,

like this case, involved a claim that earlier opinions of this Court required States to use a particular "prophylactic framework" to vindicate a defendant's constitutional rights—in that case, the constitutional right to appellate counsel. Although the Court conceded that the claim was not without some support in its cases, it rejected the claim because it "contraven[ed] [the Court's] established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Id.* at 757.

In fact, *Robbins* completely devastates the parties' claim that this Court's application of a prophylactic rule to cases coming from the State courts necessarily establishes that such a rule is impervious to change save by this Court. The rule at issue in *Robbins*—which governed appeals by convicted indigents, *see Anders v. California*, 386 U.S. 738 (1967)—had, like *Miranda*, been described by this Court as a "prophylactic framework" and "not 'an independent constitutional command.'" *Robbins*, 120 S. Ct. at 757. And, like *Miranda*, it had been announced by this Court in a State case; indeed, this Court had applied it *only* in State cases. Nonetheless, this Court concluded that the California courts had the authority to modify those procedures, so long as the alternative procedures "focus[ed] on the underlying goals that the procedure should serve," thus assuring compliance with the relevant constitutional norm. *Id.* at 760.

2. The parties cannot reasonably dispute that Section 3501 meets those requirements. The statute requires that *two* fact-finders—the trial judge and the jury—be persuaded that the defendant's confession meets the constitutional standard of voluntariness.[7] Although no single factor conclusively controls the

[7] In 1986, nearly twenty years after the passage of 18 U.S.C. § 3501, this Court for the first time squarely held that due process and the Sixth Amendment require that a defendant be permitted to reargue the voluntariness of his confession to the jury. In reaching that conclusion, the Court relied in part on Section 3501(a) and similar state statutes as evidence of a broad consensus within the federal system that such a procedure is needed to assure a fair trial. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986).



question of voluntariness, and courts are free to consider other factors, Congress's inclusion of five specific factors that trial courts *must* consider in assessing that question—including any delay in presentment and whether the defendant received *Miranda* warnings—ensures that courts will remain alert to the factors that this Court has found most likely to assure that custodial statements will in fact be voluntary.

Indeed, while reviving the traditional "totality of the circumstances" approach to admissibility, Section 3501 emphasizes protections that are required neither by the *Miranda* framework nor by the Constitution. Thus, the trial judge must consider whether the "defendant knew the nature of the offense" of which he was suspected (18 U.S.C. § 3501(b)(2)), even though such knowledge is not required to ensure a valid waiver of *Miranda* rights under this Court's cases. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987). Section 3501(b)(1) goes even further by requiring express consideration of delay in presentment, thus retaining some elements of the non-constitutional *McNabb-Mallory* rule. In that manner, Congress assured that police officers will know that protracted custodial interrogation, without judicial intervention (through which the suspect will certainly be told of his rights, *see* FED. R. CRIM. P. 5), places the admissibility of any ensuing confession at risk. *Compare Brown v. Allen*, 344 U.S. 443, 476 (1953) (under traditional voluntariness precedent, "[m]ere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained"), *with* 18 U.S.C. § 3501(c) (confession may be found inadmissible "solely because of delay" in presenting the accused to a magistrate if delay exceeds six hours). And, as the Fourth Circuit noted, law enforcement officers retain, under the statute, a strong incentive to "giv[e] the now familiar *Miranda* warnings." J.A. 210. Those procedures are plainly sufficient to meet the requirements of the Constitution.

### E. If This Court Concludes That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule, The Court Should Do So Itself

Even if petitioner and the Solicitor General are correct in asserting that Congress lacks constitutional authority to modify *Miranda*'s rigid exclusionary rule, this Court should do so to the extent necessary to sustain the constitutionality of Section 3501.

1. "*Stare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but merely reflects a policy preference for stability in the law. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). That preference is "reduced * * * in the case of a procedural rule" such as *Miranda*, "which does not serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and "cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Ibid.*; *Agostini*, 521 U.S. at 235-36.

Those principles dictate abandonment of *Miranda*'s inflexible exclusionary rule. Indeed, petitioner's contrary arguments are largely misdirected. The *stare decisis* issue in this case—if there is one—is not whether *Miranda* should be repudiated wholesale, but whether *Miranda*'s exclusionary rule should be retained. No one contends that law enforcement officers should be *precluded* from giving the *Miranda* warnings. If it is indeed true that law enforcement officers find it easy and advantageous to administer *Miranda* warnings because they virtually assure the admission of a confession (SG Br. 33-38), then self-interest alone will suffice to ensure that officers will continue to use such warnings and that the flood of litigation feared by the Solicitor General (*id.* at 37) will fail to materialize.[8] Similarly, it

[8] *Miranda*'s exclusionary rule serves, if anything, to increase the number of issues over which parties can litigate. The *Miranda* doctrine requires a trial judge to determine (1) whether the arresting officers complied with *Miranda* and its complex progeny, including rules governing how police must react to a suspect's invocation of rights, *see, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990); (2) whether the suspect "voluntarily" waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979); and (3) whether the suspect's statements are "voluntary" under due process standards. Courts almost invariably will be called upon to make several of these determinations. If the court finds that the officer violated *Miranda*, it will be required to address (as the district court did in this case) the issue of voluntariness in order to assess whether the defendant's statements can be used for impeachment and whether the government is entitled to introduce evidence derived from those statements. If the officer complied with *Miranda*, the court must still address whether the defendant voluntarily waived his rights, and whether the statements are voluntary under due process standards.



is difficult to see what valid "[r]eliance" interests in *Miranda*'s exclusionary rule conceivably could be claimed by a defendant who has suffered no actual constitutional harm—much less by society at large (SG Br. 38), whose "legitimate and compelling" interest is that the guilty be brought to justice. *Schall v. Martin*, 467 U.S. 253, 264 (1984).

Moreover, neither petitioner nor the Solicitor General comes to grips with the significant factual and legal developments that have occurred since this Court decided *Miranda*. Neither attempts to reconcile *Miranda* and its progeny with the larger body of this Court's Fifth Amendment doctrine, particularly *Counselman* and *Kastigar*; instead, both parties treat this Court's decisions in *Harris*, *Quarles* and *Elstad* as more or less *sui generis*. Nor do the parties address this Court's repudiation of *Bram*'s standard of compulsion (*Fulminante*, 499 U.S. at 285), even though the *Miranda* Court expressly based its decision on that standard. *Miranda*, 384 U.S. at 461. And although "Congress is a coequal branch of government whose Members take the same oath * * * to uphold the Constitution" as this Court does, and whose judgment is entitled to "great weight," *Rostker*, 453 U.S. at 64, neither petitioner nor the Solicitor General gives *any* weight to the fact that Congress, after conducting extensive hearings, not only rejected the "legislative facts" that underlay *Miranda*'s conclusions but also concluded that

*Miranda* inflicts unjustified harm on legitimate law enforcement practices. Those detailed conclusions, which are consistent with the experience of Maricopa County prosecutors and which are supported by contemporary scholarship, *see* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998), deserve a more respectful treatment from this Court than the Executive Branch is willing to accord them. Indeed, petitioner and the Solicitor General dismiss even the vast change in public awareness of a defendant's rights vis-à-vis the criminal justice system that has occurred since *Miranda*—a change that recently prompted this Court to observe that, "[i]n the modern age of frequently dramatized 'Miranda' warnings," it is "implausible" to suggest that a "person may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998).

2. Those considerations do not lose their force simply because the parties assert that this Court must have some authority to adopt "prophylactic" rules. *E.g.*, SG Br. 43-47. As this Court recognized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Constitution itself imposes limits on the federal government's ability to frame "prophylactic" rules, especially when those rules are made binding on the States. In particular, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 508.[9] *Miranda*'s exclusionary rule cannot meet that test and should not be reaffirmed for that additional reason. In-

[9] *City of Boerne* framed that test in order to determine whether Congress permissibly invoked its power under Section 5 of the Fourteenth Amendment. A judicially devised "prophylactic" measure must comply with *City of Boerne* because Congress's authority is, if anything, broader than this Court's implied power to devise remedies for constitutional violations. *Compare Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy test under Section 5), *with Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (refusing to strike down literacy requirement under Court's own authority to enforce the Constitution).



deed, had Congress enacted *Miranda*'s requirements itself, it is inconceivable that—after *City of Boerne*—such a statute would be upheld by this Court.

The constitutional harm that *Miranda* is designed to prevent is the risk that suspects in custody will be "compelled" to make self-incriminating statements, which will then be used at trial in violation of the Fifth Amendment. Yet the record on which *Miranda* relied for supposing that this was a pervasive problem is significantly weaker than the legislative records that the Court found inadequate to establish the pervasiveness of the underlying harm in *City of Boerne* and in every subsequent case that has considered "prophylactic" legislation. *See City of Boerne*, 521 U.S. at 531 ("anecdotal evidence" that did not reveal a "widespread pattern of religious discrimination in this country"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999) ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 649 (2000) ("it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States").

In fact, the Court conceded in *Miranda* that examples of brutality "were undoubtedly the exception" even thirty-four years ago, *Miranda*, 384 U.S. at 447, and based its conclusion primarily on "police manuals and texts" that, in its view, suggested widespread use of interrogation techniques *capable* of overbearing a suspect's free will. *Id.* at 448. As Justice White noted in dissent, however, "even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly [did] not follow that each and every case will disclose * * * this type of consequence." *Id.* at 533 (White, J., dissenting). The Court, for its part, did not contend otherwise, but was satisfied to treat the "potentiality for compulsion" (*id.* at 457) itself as the pervasive evil that justified the creation of a prophylactic rule. Because the Court failed to demonstrate that this "potentiality" was realized frequently enough to make *compulsion* pervasive, however, the *Miranda* "prophylactic" regime is essentially indistinguishable from the statutory regime this

Court struck down in *City of Boerne*. *See* 521 U.S. at 531; *cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time").

In sum, given *Miranda*'s "infirmities, and its increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (brackets omitted), no justification remains for retaining *Miranda*'s inflexible exclusionary rule, particularly in the teeth of an Act of Congress that fully safeguards the underlying constitutional right while preserving society's compelling interest in the detection and prosecution of crime. If this Court should conclude that Congress lacks sufficient authority to modify that inflexible rule, this Court should itself reject that rule and sustain Congress's judgment.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD M. ROMLEY
*Maricopa County Attorney*
PAUL AHLER
*Chief Deputy*
MARICOPA COUNTY
ATTORNEY'S OFFICE
301 W. Jefferson Street
Phoenix, Arizona 85003
(602) 506-3800

THEODORE B. OLSON
*Counsel of Record*
DOUGLAS R. COX
MIGUEL A. ESTRADA
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Counsel for Amicus Curiae*

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# AMICUS CURIAE

# BRIEF

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In The

# Supreme Court of the United States

CHARLES THOMAS DICKERSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, VARIOUS STATE PROSECUTING ASSOCIATIONS, AND THE POLICE EXECUTIVE RESEARCH FORUM IN SUPPORT OF THE JUDGMENT BELOW

HONORABLE STUART VANMEVEREN
District Attorney, 8th Judicial District, Colorado
President, National District Attorneys Association
99 Canal Center Plaza
Suite 500
Alexandria, VA 22314

JEFFREY C. SULLIVAN
Prosecuting Attorney
LAURI BOYD
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney's Office
128 N. 2d Street, Room 211
Yakima, WA 98901

ROBERT OLSON
Chief, Minneapolis Police
President, Police Executive Research Forum
CHUCK WEXLER
Executive Director
1120 Connecticut Avenue
Suite 930
Washington, D.C. 20036

LYNNE ABRAHAM
District Attorney
RONALD EISENBERG*
Deputy District Attorney
Philadelphia District Attorneys Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700
*(*Counsel of Record*)

(Additional Organizations Listed In Appendix Attached Hereto)

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## INTEREST OF THE *AMICI CURIAE*[1]

The National District Attorneys Association is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the Association's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country. They are concerned that the suppression of voluntary statements – in the name of a rule that is supposed to protect against involuntary statements – is detrimental to the victims of crime, the efforts of law enforcement to solve and prosecute crime, and the fundamental principles of the criminal justice system. The NDAA is joined on this brief by numerous state associations, representing the attorneys responsible for prosecuting most of the criminal violations in the United States.

The Police Executive Research Forum (PERF) is a national association of progressive law enforcement professionals who are dedicated to advancing innovative policing practices through research, leadership and debate. PERF's police executive members serve more than 50 percent of the nation's population. The association is a non-profit organization based in Washington, D.C. that

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[1] This *amici curiae* brief is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside of the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

also includes categories of membership for individuals who are criminal justice practitioners, academicians and others interested in improving how police serve their communities.

## SUMMARY OF ARGUMENT

The briefs in support of petitioner, including the Solicitor General's, devote considerable energy to the argument that law enforcement likes *Miranda* suppression, that police and prosecutors want a world where the only permissible way to achieve voluntary confessions is through the giving of formulaic warnings, deviation from which requires suppression.

That is simply untrue, as demonstrated by the many *amicus curiae* briefs filed in support of the decision below. These filings represent an unusually broad and deep consensus, among both police and prosecutors, that the criminal justice system should work from the ground up to develop appropriate practices for ensuring voluntary statements, rather than from the top down to impose a single way.[2]

[2] An *amicus* brief has already been filed by Americans for Effective Law Enforcement, joined by the International Association of Chiefs of Police and the National Sheriffs Association. Although nominally "in support of neither party," that brief fully supports the Fourth Circuit's decision.

In addition to this brief on behalf of NDAA and PERF, other prominent law enforcement organizations filing *amicus* briefs in support of the decision below include the Fraternal Order of Police, the National Association of Police Organizations (NAPO), the FBI Agents Association, and the Federal Law Enforcement Officers Association (which will be joining the NAPO brief).

Still more organizations, while not all filing *amicus* briefs, have stated their clear support for the positions taken here. Letter of The Law Enforcement Steering Committee, January 20, 2000, on behalf of Federal Law Enforcement Officers Association, Fraternal Order of Police, International Brotherhood of Police Officers, Major Cities Chiefs, National Association of Police Organizations, National Troopers Coalition, and Police Executive Research Forum ("We are not suggesting that *Miranda* warnings be eliminated, only that those warnings be part of a voluntariness test that will ensure that victims are not re-victimized and that we can join with prosecutors to stop repeat and serious offenders. For true fairness, the criminal justice system should address the significant number of cases in which criminals who voluntarily confess are released or the case is never brought to trial because of a technical violation in issuing *Miranda* warnings. Section 3501 properly resolves those issues").



The imposition resides not in the notion of warnings per se, but in the penalty of suppression for any violation of the warnings edict, even where it is perfectly clear that the statement is nonetheless voluntary. No matter what the outcome of this case, some variety of warnings will continue to play a valuable role in police interrogation practices. But the suppression of even concededly voluntary statements, because of the violation of a rule that exists for the sole purpose of guaranteeing voluntary statements, is the height of costly hypertechnicality.

And that cost is considerable, in the judgment of the law enforcement professionals who are charged with vindicating the concerns of victims and implementing the criminal statutes. There is much academic debate about

the degree to which warnings may discourage statements. But there can be no debate that, when a criminal is let free because his voluntary confession was not preceded by full warnings, the victim is wounded and society is harmed. The perception that these are a relatively small portion of cases is small comfort. The release of a rapist or murderer endangers the community. It simply cannot be justified on the ground that his statement was actually voluntary yet constructively involuntary.

While such a paradoxical rule reigns, true innovation is stymied. New techniques such as videotaping, not contemplated at the time of *Miranda*, are slow to spread, in part because they cannot solve the *Miranda* quandary: no matter how good police and prosecutors become at ensuring and proving the voluntariness of statements they take, their efforts are legally irrelevant in the face of a single mistake in applying the warnings requirement. The voluntary statement must still be suppressed.

Petitioner's supporters argue, in effect, that no innovation is necessary, because mandated warnings are the pinnacle of development, properly enshrined for all time, providing an easy checklist for police and courts that virtually eliminates messy litigation about voluntariness. But case law shows otherwise. The reporters are replete with cases in which defendants choose to challenge voluntariness aside from warnings, prosecutors are forced to defend, and courts are required to adjudicate. These non-*Miranda* claims infrequently succeed – not because warnings were administered, however, but because the assertions that police used physical or mental force fail on credibility grounds, or do not constitute coercion as a matter of law.



The *Miranda* exclusionary rule does not ensure voluntariness; it is distinct from voluntariness. It denigrates victims and jeopardizes the public even in situations where its ostensible concern – voluntariness – is not in question. It is imposed on police and prosecutors to the exclusion of other beneficial interrogation practices. It rewards confessed criminals with a windfall that undermines every objective of the criminal justice process. Contrary to the representations made to this Court, the majority of the law enforcement community does not welcome suppression of voluntary confessions.

## ARGUMENT

### THE *MIRANDA* RULE OF AUTOMATIC SUPPRESSION – AS DISTINCT FROM THE GIVING OF WARNINGS IN THEMSELVES – DISSERVES THE VICTIMS OF CRIME AND FRUSTRATES THE EFFORTS OF POLICE AND PROSECUTORS TO SECURE PROPER, PROBATIVE STATEMENTS FROM CRIMINAL SUSPECTS.

Since this case arose, the mantra of *Miranda* defenders has been that we have learned to live with the decision. The public knows the warnings, we are told; police have become used to reciting them; prosecutors are happy to present them into evidence.

And all that might be important, if the question were one of policy for police agencies seeking to determine whether to include warnings as part of their interrogation procedures. We believe that warnings are generally advisable when questioning criminal suspects, and should be

embodied in police practices regardless of the result in this case.

But of course that is not the question. The issue instead is whether this Court, by invoking precious constitutional authority, should compel all law enforcement officers in the United States to address the issue of voluntariness in exactly one and the same way: by reciting a specific set of warnings, dictated by this Court, on pain of suppression of any resulting statement – even where the evidence shows, or indeed where a court has found, that the confession was entirely voluntary.

Other briefs will address whether the Court truly has the constitutional power to craft such a mandate. This brief discusses the claim that law enforcement would welcome that result.

On the basis of their professional experience, the majority of law enforcement members reject the idea that the costs are nil and the benefits great when courts suppress voluntary confessions. Suppression has a dramatic impact on the victims of these crimes, and endangers other citizens. The rule of suppression, moreover, is a powerful deterrent to the development and adoption of new techniques to ensure voluntariness outside the strict confines of *Miranda*. Yet the claimed payoff is illusory: the warnings requirement does not simplify voluntariness challenges to statements; it simply adds another, independent layer of litigation, and provides the criminal defendant with a second shot at excluding probative evidence.



In analyzing the impact of *Miranda* suppression, the starting point must be with the victims and potential victims of crime. The criminal justice system was not created as a giant civics lesson to teach the public about the rights of suspects; its primary function is to protect the weak from the strong by administering a perceived disincentive to the use of illicit force. When a self-acknowledged assailant escapes proper punishment because his voluntary confession is excluded, the impact is not theoretical, not prophylactic.

These are some of the cases that represent the face of *Miranda* suppression:

*George Harpster*

The defendant was extradited from another state for the rape of a twelve-year-old girl. He was not warned upon arrival, because the receiving officer believed that the suspect had been given his rights during transit. The defendant began complaining about the victim, stating that she got what she deserved from him, but that the police would not be able to use this admission against him, because he had never been read his rights.

As the defendant had anticipated, the court suppressed his confession, ruling that warnings should have been given before the defendant began speaking. Because of the reduced evidence against him, the defendant was allowed to plead guilty to the lesser charge of child molestation, and was soon paroled. He has since violated

parole for failure to comply fully with conditions concerning contact with adolescent girls.[3]

*Carlos Sampson*

The defendant reported to police that his daughter had been kidnapped. When questioned, he admitted that he had killed the child following a custody dispute, and led police to the victim's body.

The court suppressed the statement, ruling that under the totality of the circumstances the defendant was in custody when he confessed, and that he had at least equivocally invoked his right to counsel. The court held that, although the defendant was "clearly guilty," suppression was constitutionally required under *Miranda*, and the physical evidence recovered from discovery of the body was the product of the constitutional violation. The prosecution was thereafter withdrawn.[4]

*Thomas Bennett*

The defendant and his cohorts forced their way into the victim's house, where they shot him to death and took his wallet. The defendant was informed that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney. Because *Miranda* had not yet been decided at the time, however, the defendant was not told that, if he could not afford one himself, an attorney would be

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[3] *State v. Harpster*, Information No. 97-1-00026-8, Jefferson County, Washington.

[4] *State v. Sampson*, Case No. 890327, Salt Lake County, Utah.



appointed for him. The defendant confessed and was convicted of murder in the first degree.

On appeal, the court held that *Miranda* had been violated, and reversed the conviction. On retrial, without the defendant's confession, he was acquitted.[5]

*Ruple Smith*

The defendant abducted and raped a fourteen-year-old girl. After the crime he called police because of his similarity to a composite sketch circulated in the community. He was questioned in a patrol car outside his residence and eventually acknowledged his conduct.

The court suppressed the statement, ruling that the course of the questioning reasonably led the defendant to believe at some point that he was not free to leave the patrol car, and that warnings therefore should have been administered. The case is pending on appeal.[6]

*Erika Arroya*

The defendant called police to report that her three-year-old son had drowned in the bathtub. She was given *Miranda* warnings and questioned. At one point, when she became upset, the detective asked her if she wanted to take a break. The defendant said she would like to stop talking. After the break, questioning resumed and the defendant admitted that she had killed the child. The entire interrogation was recorded on videotape.

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[5] *Commonwealth v. Bennett*, No. 928 July Term 1968, Philadelphia County, Pennsylvania.

[6] *State v. Smith*, Trial Court No. 3KN-94-1024 CR, Kenai Peninsula Borough, Alaska.

The court granted suppression. The court found that the interviewing detective had maintained a "gentle" tone throughout the questioning, and had been "repeatedly solicitous" of the defendant's condition. Nonetheless, held the court, the defendant's statement that she wanted to stop required the cessation of all further interrogation, whether or not she was actually willing to resume after the break. As a result of the suppression, the murder charge was dropped and the defendant pleaded guilty to a lesser offense.[7]

*Robert Power*

The defendant participated in the robbery/murder of a ninety-five-year-old man, who was shot three times during the crime. When contacted by police, he agreed to give them a statement. He was transported to the station and all questioning was tape recorded and transcribed.

The court suppressed the incriminating statement, ruling that the defendant was in custody at the time and that his reference to an attorney should have halted the questioning. The court specifically rejected the defendant's coercion claim, finding that the confession was voluntary. But because of the *Miranda* suppression, the charges were reduced from first degree murder, and the defendant was allowed to plead guilty to manslaughter.[8]

Suppression supporters dismiss such cases as merely "anecdotal." That is a truism. It is impossible to systematically quantify the circumstances and consequences of

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[7] *State v. Arroya*, No. 99SA153, Denver County, Colorado.

[8] *State v. Power*, Information No. 96-1-01668-8, Snohomish County, Washington.



*Miranda* suppression rulings. Most such cases never go to trial, and therefore never appear in case reporters. And when the benefiting criminal goes on to perpetrate new offenses, his *Miranda* history will generally be unknown.

Based on our experience in law enforcement, however, we can identify certain characteristics among cases in which voluntary statements are excluded for warnings violations.

We know that suppression is not merely a relic of the "old days," when officers were just learning the *Miranda* mandate. Certainly many convictions were lost in the late 60's and 70's because of the ex post facto application of *Miranda* to interrogations occurring before the case was decided. But statements are still regularly thrown out, because *Miranda* is not really a bright-line rule: it encompasses inherently ambiguous issues such as "custody" and "interrogation" and "equivocal" assertion of rights, issues that must be examined under the totality of circumstances.

We know that suppression of voluntary confessions has a disproportionate impact in more serious cases, such as child abuse and murder, in which there is frequently no available witness other than the perpetrator himself. In contrast is the Fourth Amendment exclusionary rule, which disproportionately affects cases turning primarily on physical evidence, such as drug and gun possession.

We know that, when confessions are excluded, the result is almost always a discharge or significant reduction of charges, and that admitted criminals are therefore free much earlier to commit more crime.

And we know that, when a defendant's freely given admissions are thrown out, the victim feels victimized again. Suppression of voluntary confessions is an unusual area of certainty in a frequently unsure system. In such cases, the defendant knows he perpetrated the offense; the court knows he knows; and the victim is left understandably wondering who stands for her. Such an experience will hardly build confidence in our criminal justice institutions.

But even beyond the trauma to present and future victims of crime, the *Miranda* exclusionary rule undermines its own goal of ensuring against coercion while securing probative evidence. The policy frozen into law by *Miranda* is that there is only one method for taking voluntary statements from criminal suspects. Allowed to innovate, however, without the threat of *Miranda* suppression hanging overhead, police professionals can develop alternative, and better, ways to protect defendants' rights while solving their crimes.

Exhibit A in this day is videotaping. Many departments are experimenting with creating a visual record of the interrogation process in specific cases or classes of cases. Others employ audio taping, which offers lower technological barriers and greater availability. Who can credibly contend that an officer's testimony about reciting *Miranda* warnings (often disputed by the defendant) provides a greater guarantee of voluntariness than a verbatim visual or aural chronicle of what actually occurred in the interrogation room?

The problem is that, from the perspective of current constitutional law, courts may still be free to ignore such



a compelling record. A defendant with a *Miranda* claim need prove nothing at all about the actual voluntariness of his statement; one missing warning trumps a whole spool-ful of tape. The technicality is elevated above the reality.

But even within the warnings context itself, innovation and improvement are possible. Absent *Miranda*'s one-size-fits-all straitjacket, police would be encouraged to target warnings more appropriately to the audience at hand. Policies might be developed, for example, in which younger, first-time offenders receive more extensive explanation, while defendants with a documented record of recent law enforcement contact, who have been warned many times already, are simply asked more directly if they care to answer questions. As petitioner's supporters point out, after all, the *Miranda* warnings have become embedded in public consciousness. In a post-*Miranda* world, warnings could be measured in relation to actual knowledge, rather than merely as magic words.

Similarly, some departments have already attempted to employ post-arrest interaction for more general law enforcement purposes. In New York City, for example, police have undertaken a "debriefing" program. Arrestees who have been warned and have invoked their rights in their own cases are asked whether they wish to offer background information about criminal activity in their communities, such as drug or gun trafficking. Such debriefing statements are not for use against the maker, thus protecting the suspect's core Fifth Amendment rights. But if the Constitution is extrapolated to dictate specific interrogation procedures, then any deviation could give rise to civil liability. *See California Attorneys for*

*Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (police questioning "outside *Miranda*" violates Constitution in itself and therefore exposes officers to civil suit, whether or not questioning resulted in any statement ever used as evidence against suspect).

The point is that, within the ambit of the voluntariness requirement, experienced law enforcement officials should be allowed to do their jobs. Since the time of *Miranda*, law enforcement has become increasingly professionalized. Numerous organizations have been formed, training programs abound, communication has increased. Along these lines, the Solicitor General argues that *Miranda* warnings are so valuable in the interrogation process that some agencies adopted warnings on their own, even without the compulsion of *Miranda*. Brief for the United States at 32-34. Yet the Solicitor General also contends that, unless the warnings are foisted on law enforcement by way of constitutional mandate, police will gradually "backslide." Brief for the United States at 37.

It is time to test these views. The states should be permitted their power in a federal system to devise their own solutions to important issues of public policy.[9] If a

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[9] [A]ny view of the procedure we described . . . that converted it from a suggestion into a straitjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy. . . . [I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down.

*Smith v. Robbins*, 120 S. Ct. 746, 757-58 (2000).

Remarkably, the Solicitor General cites *Smith* for the proposition that the Court can and should create, and impose on the states, prophylactic procedures that go beyond constitutional requirements. Brief for the United States at 44. This is a studied effort to turn the *Smith* ruling upside down. *Smith* actually held that the Court would not force the states to employ federally created procedures for protecting constitutional rights – even where many had assumed, for over thirty years, that those procedures were mandatory.

[10] The Brief of *Amici Curiae* Griffin B. Bell, *et al.*, 8-11, presents a series of quotations from various law enforcement officials stating their "support [for] *Miranda*." But the brief's use of these statements in support of the petitioner's position is misdirection. As many of the quotations make clear, the support expressed for "*Miranda*" means support for *Miranda* **warnings**, not necessarily support for *Miranda* **suppression**. We do not challenge the value of appropriate warnings policies. We simply want to give law enforcement professionals the ability to devise those policies, within the bounds of their expertise and the dictates of the Fifth Amendment, and without fear that the slightest deviation from formula will let a serious criminal go free.



strict regimen of warnings is as efficacious as the petitioner's supporters suggest, let it compete against other methods, in the marketplace of modern crime-fighting and under the scrutiny of vigorous litigation.[10]

To pursue that inquiry, it is necessary to explore one central myth of *Miranda*: that the rule of suppression refines voluntariness issues, simplifying the burden on police and prosecutors and facilitating the adjudication process for judges. As mentioned previously, however, the *Miranda* rule in fact encompasses various imprecise

threshold questions, such as "custody," that require just the kind of totality of circumstances analysis which *Miranda* is supposed to avert.

But even aside from that problem, it is clear that *Miranda* suppression in no way subsumes the voluntariness inquiry; on the contrary, it simply creates another way for defendants to win, on grounds that seldom have anything to do with whether a confession was coerced. If police botch the warnings, the claim is complete; there is no cause to examine the defendant's state of mind. Ironically, therefore, it may be much easier to prevail on a *Miranda* claim than on a coercion theory. And predictably, therefore, *Miranda* claims have become numerous.

That hardly means, however, that traditional voluntariness challenges have faded away over the last thirty years. The allegations are legion. Defendants say that they were beaten, bribed, blandished. Such claims often demand laborious factual inquiry, in which the presence or absence of warnings is essentially meaningless: if these dramatic assertions of coercion were really true, the reading of warnings, however scrupulously, could not save the statement.[11] This is the paradox at the heart of

[11] *E.g.*:

*Green v. Scully*, 850 F.2d 894 (2d Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police allegedly promised leniency, told suspect he could get the electric chair, and lied about evidence they had against him).

*Hawkins v. Lynaugh*, 844 F.2d 1132 (5th Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement



*Miranda*. A rule of suppression devised to exclude coerced confessions usually comes into play only when the confession was in fact voluntary.

was involuntary because police allegedly promised psychiatric treatment).

*United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because officer "coerced" suspect by telling him he could get in serious trouble for lying); *United States v. Rigsby*, 943 F.2d 631 (6th Cir. 1991) (rejecting defendant's claim that, although he was read *Miranda* warnings, statement was involuntary because police threatened to "bust in" his head); *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because suspect was under influence of drugs and police were yelling and had guns drawn during questioning); *United States v. Gatewood*, 184 F.3d 550 (6th Cir. 1999) (no *Miranda* warnings claim; rejecting defendant's claim that statement was involuntary because police allegedly picked him up and threw him, and threatened to charge him with other crimes and keep him from his wife); *United States v. Starks*, 1997 U.S. App. LEXIS 12016 (6th Cir. 1997) (rejecting argument that, although suspect was read *Miranda* warnings, statement was involuntary because police threatened to turn him over to federal authorities).

*Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police allegedly beat suspect before previous statement, and lied to him about incriminating evidence against him).

*Feltrop v. Delo*, 46 F.3d 766 (8th Cir. 1995) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that confession was involuntary because suspect was claustrophobic, nervous, and tired, and because police coerced him by

The Solicitor General makes much of *Miranda*'s status as a "conclusive presumption" of involuntariness. Brief

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asking if he was Christian and telling him killer had blood on his hands); *Sumpter v. Nix*, 863 F.2d 563 (8th Cir. 1988) (no *Miranda* warnings claim; rejecting claim that confession was involuntary because police allegedly promised leniency and treatment for alcoholism); *United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because police told suspect she would be arrested if she did not cooperate, but that if she did, they would notify prosecutor of the cooperation).

*United States v. Kelley*, 953 F.2d 562 (9th Cir. 1992) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because suspect was going through heroin withdrawal); *Guam v. Muna*, 999 F.2d 397 (9th Cir. 1993) (no *Miranda* warnings claim; rejecting defendant's claim that statement was involuntary because police threatened to impound his car, and told him others had already implicated him).

*Lucero v. Kerby*, 133 F.3d 1299 (10th Cir. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police told suspect, falsely, that they had fingerprint evidence against him); *United States v. Cisneros-Cruz*, 1999 U.S. App. LEXIS 14899 (10th Cir. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because officer slamm[illegible] his fist down on table during questioning).

*McCoy v. Newsome*, 935 F.2d 1252 (11th Cir. 1992) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because police coerced suspect by holding him for unreasonable time and threatening him with life imprisonment, and because he was under influence of alcohol and marijuana); *Moore v. Dugger*, 856 F.2d 129 (11th Cir. 1988) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that



for the United States at 43. But that presumption serves only to sharpen the dilemma. The presumption must be

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statement was involuntary because suspect was allegedly deprived of food and sleep and was promised that he could go home if he confessed).

*State v. Pettit*, 979 P.2d 5 (Ariz. App. 1998) (rejecting *Miranda* warnings claim; separately addressing and accepting claim that statement was involuntary because police promised defendant that any statement he made would not be used against him).

*Stevens v. State*, 941 S.W.2d 411 (Ark. 1997) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police did not offer suspect food and made clear that they would continue questioning until he confessed); *Noble v. State*, 892 S.W.2d 477 (Ark. 1995) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police appealed to defendant's religious convictions, showed him photographs of murder victim, and assured him of reliability of polygraph).

*People v. Jones*, 949 P.2d 890 (Cal. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police promised to intercede with prosecutor, falsely implied that they had other inculpatory evidence, and told suspect that the truth would set him free).

*People v. Hutton*, 831 P.2d 486 (Colo. 1992) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police informed suspect that he had flunked polygraph); *People v. Gennings*, 808 P.2d 839 (Colo. 1991) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because polygrapher threatened to report results to suspect's employer).

*State v. Pinder*, 736 A.2d 857 (Conn. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because police said that polygraph results could be used in court, that victim's parents had right to know what happened, and that suspect would be better off if he told truth); *State v. LaPointe*, 678 A.2d 942 (Conn. 1996) (rejecting

conclusive precisely because it is a legal fiction. The truth is that the absence of warnings, in itself, cannot overcome

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*Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because defendant had a dependent personality disorder, and because police told him, falsely, that his fingerprints were on the murder weapon); *State v. Casiano*, 740 A.2d 435 (Conn. App. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because police promised defendant he would only get ten years).

*State v. Gella*, 988 P.2d 200 (Hawaii 1999) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because the defendant had been struck by police during his arrest, still felt dizzy and in pain, and had not slept in four days).

*People v. Hardaway*, 718 N.E.2d 682 (Ill. App. 1999) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because defendant was not allowed opportunity to consult with parents or youth officer).

*Light v. State*, 547 N.E.2d 1073 (Ind. 1989) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because suspect was drowsy, and because police gave him false legal advice and told him they had a letter incriminating him).

*State v. Reid*, 394 N.W.2d 399 (Iowa 1986) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because defendant was mentally retarded and police falsely told him that victim's hymen had been perforated).

*State v. Jones*, 984 P.2d 132 (Kan. 1999) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because police allegedly promised to have charges reduced to involuntary manslaughter).

*State v. Wilms*, 449 So. 2d 442 (La. 1984) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because police allegedly promised to release suspect's pregnant, ill wife, who had been arrested with him).



evidence of free will such as a videotape or a proven record of familiarity with one's rights. The presumption serves, in effect, as an exercise of judicial fiat to achieve a particular policy choice about police practices.

Those policy choices should not be the exclusive province of the courts; the responsibility must be shared by elected and executive officials charged with the duty to shape and manage the criminal justice system. The Congressional statute at issue is an appropriate exercise of that responsibility.

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*Williams v. State*, 732 A.2d 376 (Md. App. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because suspect had a hangover).

*Commonwealth v. Edwards*, 651 N.E.2d 398 (Mass. 1995) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police told defendant, falsely, that his handprint had been found at murder scene); *Commonwealth v. St. Peter*, 722 N.E.2d 1002 (Mass. App. 1999) (rejecting claim that, although *Miranda* warnings were administered, statement was involuntary because defendant was under influence of drugs and alcohol and in pain from tooth extraction).

*People v. Sexton*, 580 N.W.2d 404 (Mich. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because suspect was deprived of food and sleep for 21 hours).

*State v. Collins*, 446 P.2d 325 (Wash. 1968) (rejecting claim that, although defendant was advised of his rights, statement was involuntary because police promised him reduced sentence).

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

HONORABLE STUART VANMEVEREN
District Attorney, 8th Judicial District, Colorado
President, National District Attorneys Association
99 Canal Center Plaza
Suite 500
Alexandria, VA 22314

JEFFREY C. SULLIVAN
Prosecuting Attorney
LAURI BOYD
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney's Office
128 N. 2d Street, Room 211
Yakima, WA 98901

ROBERT OLSON
Chief, Minneapolis Police
President, Police Executive Research Forum
CHUCK WEXLER
Executive Director
1120 Connecticut Avenue
Suite 930
Washington, D.C. 20036

LYNNE ABRAHAM
District Attorney
RONALD EISENBERG*
Deputy District Attorney
Philadelphia District Attorneys Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700
*(*Counsel of Record*)

(Additional Organizations Listed In Appendix Attached Hereto)



## ADDITIONAL ORGANIZATIONS JOINING BRIEF

Honorable John M. Tyson Jr.
District Attorney, 13th Judicial Circuit, Alabama
President, Alabama District Attorneys Association

Honorable Charles Hastings,
County Attorney
Yavapai County, Arizona
Chairman, Arizona Prosecuting Attorneys' Advisory Council

Honorable Grover Trask
District Attorney
Riverside County, California
President, California District Attorneys Association

Honorable William Ritter
District Attorney, 2nd Judicial District, Colorado
President, Colorado District Attorneys Council

Honorable Brad King
State Attorney, Fifth Judicial Circuit, Florida
President, Florida Prosecuting Attorneys Association

Honorable Kermit McManus
District Attorney, Conasauga Judicial Circuit, Georgia
President, Georgia District Attorney Association

Honorable Kipp Manwaring
Prosecuting Attorney, Bonneville County, Idaho
President, Idaho Prosecuting Attorneys Association

Honorable Robert Gevers, II
Prosecuting Attorney, 38th Judicial Circuit, Indiana
President, Association of Indiana Prosecuting Attorneys

Honorable Julie McKenna
County Attorney
Saline County, Kansas
President, Kansas County and District Attorneys Association

Honorable Joseph I. Casserly
State's Attorney
Harford County, Maryland
President, Maryland State's Attorney Association

Honorable Brian Mackie
Prosecuting Attorney
Washtenaw County, Michigan
President, Prosecuting Attorneys Association of Michigan

Honorable Mary O'Donnell
State's Attorney
Rolette County, North Dakota
President, North Dakota State's Attorneys Association

Honorable Christine A. Cooke
County Attorney
Big Horn County, Montana
President, Montana County Attorney's Association

Honorable Michael Spahr
Prosecuting Attorney
Washington County, Ohio
President, Ohio Prosecuting Attorneys Association

Honorable Ellen Totzke
County Attorney
Hall County, Nebraska
President, Nebraska County Attorneys Association

Honorable Dianne Barker
Harrold, District Attorney, 27th District, Oklahoma
President, Oklahoma District Attorneys Council

Honorable John B. Dangler
County Prosecutor
Morris County, New Jersey
President, New Jersey Prosecutor's Association

Honorable Jack L. Banta
District Attorney
Douglas County, Oregon
President, Oregon District Attorneys Association

Honorable Jeanine Pirro
District Attorney
Westchester County, New York
President, New York District Attorneys Association

Honorable John C. Morganelli,
District Attorney,
Northampton County, Pennsylvania
President, Pennsylvania District Attorneys Association



Honorable Richard E. Trodden
Commonwealth's Attorney
Arlington County, Virginia
President, Virginia Association of Commonwealth's Attorneys